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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 583.

SUFFOLK SECURITIES CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Suffolk Securities Corporation, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled case on June 19, 1942.

OPINION BELOW.

The findings of fact and opinion of the Board of Tax Appeals (R. 18-34) are reported in 41 B. T. A. 1161. The opinion of the Circuit Court of Appeals (R. 151) is reported in 128 Fed. (2nd) 743.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on July 6, 1942 (R. 152), and a petition for re-hearing was denied on September 12, 1942 (R. 164). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether the Circuit Court of Appeals for the Second Circuit departed from the accepted and usual course of judicial proceeding in its decision and opinion concluding that there was substantial evidence to support the determination of the Board of Tax Appeals, that petitioner was availed of during the taxable year for the purpose of preventing the imposition of surtax upon its stockholder.

2. Whether the taxes assessed under Section 104 of the Revenue Act of 1928, in the instant case, are so unreasonable, burdensome and confiscatory as to be in violation of the Fifth Amendment to the Constitution, or amount to a limitation on the powers of the State to control corporations, in violation of the Tenth Amendment to the Constitution.

STATUTES INVOLVED.

The statutes involved are set forth in the Appendix, *infra*, pages 17-18.

STATEMENT.

The petitioner was organized under the laws of Delaware on December 9, 1922 to succeed to and liquidate the partnership of B. H. Howell Sons & Company composed of three partners. This partnership, for a period of about 75 years, had been engaged in the business as commission merchants and fiscal and financial agents for various sugar companies, which began to lose money in 1922 and decided to liquidate and discontinue its business. The partnership

transferred to the corporation many of its assets and liabilities consisting of stocks and securities, bills receivable, cash, claims and certain securities of the individual partners (R. 60-67) for which it issued its capital stock to the former partners in proportion to their partnership interests and the individual assets transferred. The corporation consisted of three stockholders when formed, and in 1925 two of the stockholders withdrew from the corporation taking certain assets and surrendering their stock, which was cancelled, after which James H. Post became the sole stockholder. The corporation continued to hold many of the assets and liabilities it received upon formation and from time to time acquired small amounts of other stock when it had cash to purchase same, and sold some of its assets. Two of its large assets consisting of claims, one against the United States Government in the amount of $1,200,000 and one being the Hoyt claim for $407,500, were finally liquidated in 1932 and 1929, respectively, and the stock of the Dominican Sugar Corporation was not disposed of until 1931 at a loss of over $1,000,000. The petitioner filed the income tax returns for the fiscal years ending November 30, 1923 to November 30, 1931, which income tax returns all showed statutory net losses and no tax due. During these years, eliminating prior year losses as deductions, the statutory net income of the petitioner was as follows:

1923	$192,290.77	(loss)
1924	691,470.67	(loss)
1925	147,832.81	(income)
1926	57,465.45	(income)
1927	58,633.97	(income)
1928	90,657.42	(income)
1929	1,199.51	(loss)
1930	78,109.67	(loss)
1931	1,301,600.94	(loss)

(R. 115.)

The balance sheets and analysis of surplus included in the petitioner's income tax returns showed a deficit for each year, except the year 1930 when it showed a book surplus of $72,947.13, and a deficit for the year 1931 of $1,125,006.16 (R. 114). The assets were carried in the balance sheets at cost. On November 30, 1930 the book value or cost of petitioner's assets was $5,691,223.52. The then market value of the same assets was $4,105,522.78 showing a depreciation in the value of the assets of $1,585,700.74 (R. 82). No dividends were declared or paid by the petitioner from the time of its organization to and including the taxable year ending November 30, 1930. On January 5, 1936 the Commissioner of Internal Revenue determined a deficiency of $56,543.96, which bore interest at 6 per cent from February 1, 1930 under Section 104 of the Revenue Act of 1928 (R. 11-16) on the theory that the petitioner had been formed or availed to prevent imposition of surtaxes on its stockholder. A petition was filed with the Board of Tax Appeals for a re-determination of the deficiency (R. 5-10). On May 15, 1940 a division of the Board of Tax Appeals promulgated findings of fact and opinion affirming the determination by the Commissioner which was not reviewed by the Board (R. 17-34). A motion was filed with the Board of Tax Appeals to have the decision reviewed by the whole Board, which was denied (R. 38). A petition for review was filed with the United States Circuit Court of Appeals for the Second Circuit, which Court, on June 19, 1942, by per curiam opinion, affirmed the decision of the Board (R. 151) and a motion for rehearing was denied on September 12, 1942 (R. 164).*

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* A full statement of the facts is shown by the findings of fact by the Board of Tax Appeals (R. 19-28) and the statement of evidence with exhibits (R. 48-145).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In finding, concluding and holding that there was substantial evidence to support the findings of the Board of Tax Appeals, that the petitioner had been availed of to prevent the imposition of surtaxes upon its stockholder.

2. In finding, concluding and holding that the questions to be considered by it were questions of fact, and failing to find that the ultimate finding and conclusion of the Board of Tax Appeals was a question of law or mixed law and fact subject to judicial review and the Court's right to substitute its judgment for that of the Board of Tax Appeals.

3. In finding that the evidence, with every reasonable inference to be drawn therefrom, supported the Board's findings of fact, conclusion and opinion.

4. In failing to find that the Board of Tax Appeals' decision resulted in the assessment of taxes contrary to the Fifth and Tenth Amendment of the Constitution.

5. In affirming the Board's order of re-determination of the deficiency in tax of $56,543.96.

REASONS FOR GRANTING THE WRIT.

In its review of the decision of the Board of Tax Appeals, the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, specifically in failing to determine the questions of law or mixed law and fact which were raised by the ultimate finding and conclusion of the Board of Tax Appeals.

2. This case presents the question of whether the tax as assessed pursuant to the decision of the Board, as affirmed below, is in violation of the Fifth Amendment to the Constitution.

3. Whether the taxes, as assessed pursuant to the decision of the Board of Tax Appeals as affirmed below, amount to a limitation on the powers of the State to control corporations in violation of the Tenth Amendment to the Constitution.

WHEREFORE, your petitioner respectfully urges that the questions presented are such as should be finally settled and determined by this Court, and that this petition be granted.

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